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No. 10-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States OFFICE OF THE CLERK

MOHAMMED SALIM ISMAIL,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in narrowly construing the scope of its jurisdiction to review cancellation of removal applications for aliens by the Board of Immigration Appeals under 8 U.S.C. § 1252(a)(2)(B) and applied an incorrect legal standard in direct conflict with the construction of those statutes by numerous other circuits?

2. Whether the Attorney General has the authority to waive removability of aliens present in the United States found to be "inadmissible" by "fraud or willfully misrepresenting a material fact," and if so what standards should be applied by the circuit courts to ensure aliens are not deprived of due process and a fundamentally fair immigration hearing.

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OPINIONS BELOW

The opinion of the court of appeals is unreported. (App. A) The decision of the Board of Immigration Appeals affirming the immigration judge's decision and dismissing his appeal is also unreported. (App. B) The oral decision of the immigration judge is attached as App. C.

JURISDICTION

The petitioner filed a timely petition for rehearing which was denied on December 8, 2010. (App. D) The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Mohammed Salim Ismail, is a native and citizen of Pakistan who entered the United States in December, 1993 on a valid visitor's visa. Petitioner had been previously "excluded" from the United States under a different name years before. Upon his re-entry 1993, he remained in the United States and later married a United States citizen in 1995. In 2001, he was granted lawful permanent residency. In addition to his U.S. citizen wife, he has two U.S. citizen children, ages six and ten. In 2006, after filing for naturalization his application was denied and he was issued a Notice to Appear ("NTA") in removal proceedings before an immigration judge by the Department of Homeland Security. He was charged with removability based on a willful misrepresentation of material fact, or fraud, in violation of INA § 237(a)(1)(A). DHS attempted to remove him from the United States and strip him of his lawful permanent residency for his illegal entry into the United States years before.

It is for this violation, one which he fully admits, that he requested a "waiver" under the immigration laws. Petitioner appeared before an immigration judge in Atlanta, Georgia, conceded the allegations in the NTA, specifically admitted that he broke the law years earlier by entering the U.S. illegally and requested a waiver ("waiver application") of inadmissibility pursuant to INA § 237(a)(1)(H). A waiver permits aliens in removal proceedings with "qualifying relatives" namely Mr. Ismail's United States Citizen wife and two children, to obtain a waiver for the offense, and have their removal proceedings "cancelled" by an immigration judge.

The provisions of section 237(a)(1) of the Act also known as a "§ 237(a)(1)(H) waiver" relating to the removal of an alien on the ground that he was inadmissible at the time of admission as an alien described in INA Section 212(a)(6)(C)(i) for fraud or willful misrepresentation of a material fact at the time of admission, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien who meets the requirements under section 237(a)(1)(H)(i) or (ii) of the Act. The Board of Immigration Appeals ("Board" or "BIA") has found that INA Section 237(a)(1)(H) authorizes a waiver for charges of inadmissibility under INA Section 212(a)(7)(A)(i)(I), for a lack of a valid visa or entry document. *Matter of Fu*, 23 I&N Dec. 985, 988 (BIA 2006). In fact, the BIA has recognized that Congress's intent in enacting INA Section 241(a)(1)(H) [now INA Section 237(a)(1)(H)] was to foster, in appropriate cases, the unity of families composed, in part, of U.S. citizens or LPRs, (like Mr. Ismail) in its own administrative decisions in *Matter of Tijam*, 22 I&N Dec. 408, 416-17 (BIA 1998), and in *Matter of Aldecoaotalora*, 18 I&N Dec. 430, 431 (BIA 1983).

For petitioner, a waiver of removability for fraud or misrepresentation granted under section 237(a)(1)(H) operates to waive deportation based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation under INA Section 237(a)(1)(H)[1].

In support of that waiver application, Petitioner provided the immigration judge with his marriage certificate, birth certificates, photographs, documentation of volunteer service, mortgage statements for his home and business, letters from members of the community in his support, and personal and business tax returns.

Petitioner admitted to the Immigration Judge that he had made two unsuccessful attempts to enter the United States through use of a purchased passport and assumed name and that his third successful entry was also through use of a purchased passport and assumed name. Petitioner told the immigration judge that he did not disclose his attempts or the circumstances of his entry during his previous I-130 alien relative interview with DHS. Petitioner admitted these facts during a 2005 interview with DHS, however. The immigration judge subsequently denied his waiver application, however, stripped him of his lawful permanent residency and ordered him removed from the United States on November 5, 2007.

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1. *See also the BIA decision of Matter of Sosa-Hernandez*, 20 I&N Dec. 758, 760-761 (BIA 1993) (finding that a waiver of deportability under section 241 of the Act [now INA Section 237(a)(1)(H)] waives not only the exclusion ground but also the underlying fraud and renders the waiver recipient an LPR from the time of his initial entry).

The Petitioner timely filed a notice of appeal with the BIA, appealing the November 5, 2007 decision of the IJ. In a 2-1 panel decision issued on October 15, 2009, the Board affirmed the decision of the IJ and dismissed his appeal. The dissenting BIA panel member stated that where the fraud was the only adverse factor in the case and where there was a string of significant equities, she would sustain the appeal, however. The Petitioner also filed a timely motion to reconsider to the BIA on October 28, 2009. Petitioner filed a subsequent motion to reopen and remand for consideration of new evidence in December, 2009. Both motions were denied by the Board in its June 8, 2010 decision. Petitioner, on November 11, 2009, timely sought a petition for review with the Eleventh Circuit Court of Appeals of that decision and of both the motion to remand and the denial of his motion for reconsideration. On October 13, 2010, the Eleventh Circuit Court of Appeals dismissed his petition for review. The Eleventh Circuit court held that "(b)ecause the decision to deny Ismail"s (petitioner's) waiver of removal under INA 1227(a)(1)(H) was discretionary...[it lacked] jurisdiction to review the BIA's decision." p. 4.

On November 1, 2010, petitioner filed a petition for panel rehearing. On December 8, 2010, the Eleventh Circuit Court issued an order denying petitioner's request for rehearing.

The record below shows petitioner is a hard worker and successful entrepreneur in the United States, living his version of the American dream. He operates four gas stations in Georgia and was planning to open a franchised restaurant. He employs and manages eight individuals. He is solely responsible for the daily operations and

management of all four gas stations and co-owns these businesses with his wife, who does not participate in the business aspect of their joint venture.

The record also shows petitioner's strong desire to come to the United States and to make a good life for himself in this country fueled his decisions to attempt entry with a purchased passport. Once he successfully entered the U.S., albeit illegally, he became an upstanding member of the Atlanta-area community and made his dream a reality. His testimony reveals that he felt he must do everything possible to come to America, and therefore remained silent on the facts about his past when meeting with immigration officials during his lawful permanent residency interview, facts which he later revealed to DHS when applying for naturalization. The advent of a wife and children strengthened his resolve to remain in this country in order to be a good, present husband and father. Living in the United States is dream come true for petitioner, and he has contributed positively not only to his U.S. citizen-family but his community during the years he has lived here, providing jobs to United States citizens as a result. He has no criminal record inside or outside the United States.

ARGUMENT

I.

THE ELEVENTH CIRCUIT DID NOT FOLLOW OTHER CIRCUIT COURT DECISIONS OF CONTROLLING AUTHORITY TO BE ACCORDED REVIEW OF BIA MATTERS INVOLVING THE "BALANCING TEST"

A. The question presented here is of exceptional importance because it has far-reaching implications for all immigrants under the Eleventh Circuit jurisdiction seeking BIA review of waiver applications for lawful permanent residents under §237(a)(1)(H)(I); 8 U.S.C. § 1227(a)(1)(H)(i)(I)-(II)

As part of its amendments to the Immigration and Nationality Act (INA) in 1996 Congress provides a discretionary "forgiveness" or "waiver" for aliens in removal proceedings for certain misrepresentations and fraud at admission that would otherwise render deportable a lawful permanent resident (LPR) or a self-petitioner under the Violence Against Women Act (VAWA). This waiver provides significant relief from removal for those who are eligible. For all applicants, a grant of the waiver will result in termination of proceedings. The waiver also will validate the applicant's LPR status back to the date of admission, even if that status was originally obtained through fraud or misrepresentation.

When an alien is found to be "inadmissible" because "by fraud or willfully misrepresenting a material fact," he "sought to procure or ha(d) procured . . . a visa, other

documentation, or admission into the United States, the Attorney General has the authority to waive removability if certain requirements are met:

> The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182(a)(6)(C)(I) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien . . . who-
>
> (i)(I) is the spouse, parent, son, or daughter of a citizen of the United States for permanent residence; and
>
> (II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission . . . .
>
> 8 U.S.C. § 1227(a)(1)(H)(i)(I)-(II), INA § 237(a)(1)(H)(I)-(II).

This statutory waiver provision contained in INA § 237(a)(1)(H) provides:

> (H) Waiver authorized for certain misrepresentations. The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the

> discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who–(i) (I) is the spouse, parent, son or daughter of a citizen of the United States or an alien lawfully admitted to the United States for permanent residence; and
>
> (II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation. (ii) is a VAWA self-petitioner.
>
> A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

There were prior versions of this waiver, and it has been amended by Congress numerous times. For example, prior to 1981, the statute mandated that the waiver be granted to any applicant who met the eligibility requirements. In 1981, the waiver was amended such that it is now discretionary. It also has been renumbered three times. Prior to 1990, the waiver existed at INA § 241(f). In 1990, the § 241(f) waiver was amended and renumbered as INA § 241(a)(1)(H). In 1996, this waiver again was renumbered, this time as the still-current § 237(a)(1)(H).

This Court has ruled that the § 237(a)(1)(H) waiver is a humanitarian waiver which Congress intended would

prevent the break-up of families with U.S. citizen or LPR members. *INS v. Errico*, 385 U.S. 214 (1966). This Congressional intent has influenced a number of BIA interpretations of the waiver as well. In some instances, the BIA interpreted the waiver liberally to give effect to Congress' purpose. *See, e.g., Matter of DaLomba*, 16 I&N Dec. 616 (BIA 1978) (expansively interpreting the requirement that a noncitizen be "otherwise admissible"); *Matter of Anaba*, 18 I&N Dec. 87 (BIA 1981) (same). However, the BIA also has relied on the purpose behind the waiver to limit its availability. *See, e.g., Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008) (Congress' purpose to unite family members is not served where the qualifying relative is deceased); *Matter of Matti*, 19 I&N Dec. 43 (BIA 1984) (denying waiver after finding that family relationships entered into solely to obtain immigration benefits are not the type of families Congress intended to preserve).

The one eligibility requirement that is common to all is that the applicant cannot be a person who participated in Nazi persecution, genocide, or the commission of an act of torture or extrajudicial killing, as described in INA § 237(a)(4)(D). Beyond this, the eligibility requirements for a § 237(a)(1)(H) waiver are specific to two classes of applicants: 1) non-citizens with a qualifying family member who meet certain other requirements and 2) VAWA self petitioners.

Section 237(a)(1)(H) of the Immigration and Nationality Act ("INA") waives removal of persons who were inadmissible at the time of entry or adjustment of status because of fraud or misrepresentation, either willful or innocent, in the procurement of a visa or other documentation of admission to the United States. Under

this rule, the government retains discretion to waive inadmissibility for persons who are the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident who were in possession of an immigrant visa and otherwise admissible to the U.S. *Matter of Fu*, 23 I&N Dec. 985 (BIA 2006). As reiterated *infra*, in enacting this waiver provision, Congress' purpose was to prevent the unnecessary break-up of families with U.S. citizen or permanent resident members. *See generally, INS v. Errico*, 385 U.S. 214 (1966).

In this case, both the Immigration Judge and the Board of Immigration Appeals concluded that Petitioner met all of the statutory requirements of INA § 237(a)(1)(H). However, as a matter of discretion, the IJ denied Petitioner's waiver request, and this finding was affirmed by the BIA.

B. The decision by the Eleventh Circuit in *Ismail* will cause inconsistent judicial rulings amongst immigration judges and agency rulings nationwide.

The underlying fraud which is used to determine inadmissibility may be considered as part of the discretionary analysis regarding the grant or denial of the requested waiver by the adjudicator. *Matter of Tijam*, 21 I&N Dec. 408 (1998). In adopting the analysis stated in *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), the BIA has set forth a balancing test to determine whether favorable discretion must be exercised. *Matter of Tijam*, 21 I&N Dec. at 412 (the "question whether to exercise discretion favorably necessitates a balancing of an alien's undesirability as a permanent resident with the social and humane considerations present"). As established

by *Marin*, positive factors include family ties within the United States, length of duration of residency in the United States, evidence of hardship to the respondent and his family in the event of deportation, employment history, property or business ties, value and service to the community, proof of genuine rehabilitation, and evidence of the respondent's good character. Meanwhile, negative factors include the nature and underlying circumstances of the fraud or misrepresentation involved, existence of a criminal record, and evidence of bad character or undesirability. To avoid reversal, the BIA must consider all equities. *Virk v. INS*, 295 F.3d 1055, 1059-61. (9th Cir. 2002).

Proper application of the *Marin* factors to this case show that a favorable grant of discretion was the only right outcome, yet the Eleventh Circuit Court dismissed both the petition for review and the petition for panel rehearing. First, petitioner has significant family ties in the United States. He has a wife and two young children, all of whom are U.S. citizens. In addition, his mother and siblings are lawfully present in this country as permanent residents. Respondent has lived in the United States since 1993—a period of time approaching twenty years. This country has been his home for his entire adult life, and he has put down substantial roots and made significant investments here. Petitioner has a strong history of employment in this country, which correlates to his notable property and business ties in the form of four gas stations and a planned restaurant opening. He employs eight individuals and has stimulated the economy through investment and business growth. He has shown himself to be a hard worker and successful business man. He maintains flawless business records and routinely pays his taxes. His business

contributions to his community are valuable, as are his voluntary service efforts. He is a good father and good husband, demonstrating overall good character.

Petitioner's forced departure from this country after so many years would create serious hardship for his family members. He has built a comfortable, steady lifestyle for his wife and children, upon which they rely. If he had to leave the U.S., he would not be able to continue to manage and run his businesses, and he would either have to give them up or see them fail due to lack of supervision. If his family ultimately chose to accompany him, life in Pakistan would be a dramatic and shocking change for two young children used to life in this country and at critical points in their educational process. They would not have the same access to education, health care, and other opportunities and benefits in Pakistan that they currently enjoy. It would also be extremely difficult for them to assimilate to the cultural and language change. If they remained, they would lose their father—an irreplaceable person in their lives—and would suffer serious emotional and financial hardship. This type of hardship is exactly what INA § 237(a)(1)(H) was instituted to prevent, and it is unnecessary in this case to destroy family unity or to uproot Petitioner's family where there are such strong and sympathetic equities. Recently, in *Champion v. Holder*, 626 F.3d 952 (7th 2010), The Seventh Circuit Court of Appeals similarly remanded a matter where the immigration judge and BIA assumed that the father of Petitioner's children would remain a source of the children's support in the event of Petitioner's deportation, and ignored the possibility of the father's deportation. 626 F.3d at 953 (7th Cir. 2010). Thus an inappropriate application of the facts required the matter be reversed and remanded to the BIA.

Although the hardship to Petitioner's family would indeed be great, Petitioner is not obligated to establish extreme hardship in order to merit a favorable exercise of discretion under the *Marin* analysis. Simple hardship is sufficient, and Petitioner has met this burden. The IJ erroneously attempted to hold Petitioner to a standard of extreme hardship and reached the conclusion, based on an inaccurate application of the test, that Petitioner did not make this showing. Review of this conclusion based on the appropriate standard is necessitated, and the proper finding is that sufficient hardship exists in this case.

Balanced against the numerous and significant positive equities is only Petitioner's underlying fraud. There is no criminal history or showing of undesirability present in this case. As the dissenting Board member in the October 15, 2009 decision stated:

> The record demonstrates that the respondent has a string of significant equities. For instance, the respondent has lived in this country more than 15 years. See Tr. at 19. During that time he has purchased and operated multiple successful businesses, which has enabled him to make substantial contributions to the community. See Tr. At 20-21, 24-26, 28-31, 34-36, see also Tr. At 51-53. The respondent also has substantial family ties to this country, including two United States citizen children. See Tr. At 19, 21, 31, 36-37. Both of the respondent's children have grown up in this country, and they may have difficulty adjusting to life in Pakistan. See Tr. At 34. 42-43, 47-50, 53. Balanced against these equities is the respondent's misconduct. While the significance of the respondent's immigration

> fraud cannot be understated, there appear to be no other adverse factors in the matter. See generally Tr. At 13-19, 22-24, 26-27, 33, 37-42 (discussing the respondent's misconduct). Accordingly, I would sustain the appeal. (AR 95)

While Petitioner's fraudulent acts and statements to gain admission to and remain in the United States were wrong, the instances of fraud in this case all stemmed from Petitioner's desire to build the life of his dreams in the U.S. and to keep it once he had obtained this dream. This is not a situation where Petitioner engaged in a complex conspiracy to assist numerous persons in illegally entering the United States or processed and provided false documentation to others. His acts were confined and personal in nature. Contrary to the assertions of the IJ, they do not show a level of sophisticated planning and calculation. Moreover, Petitioner willingly attended each and every requested interview and court hearing and made himself accessible for these meetings and inquiries, ultimately revealing to immigration officials his past acts and reasons for concealing them.

When all of the positive factors are properly balanced with the single negative component in this case, it is evident that the positive factors in this case are significant and substantial, far outweighing anything else and supporting a favorable exercise of discretion. Had the IJ and BIA employed the appropriate balancing test, they would have reached this conclusion and held that the INA § 237(a)(1)(H) waiver should have been granted. The denial of the waiver was improper, and the decision of the Eleventh Circuit must not stand.

This evidence of the extreme hardship that Petitioner's wife and children face in the event of his departure is a critical factor in the overall balancing test that must be performed to determine if relief is merited as a matter of discretion. Added to the numerous positive factors already present in this case, this independent evaluation of the hardship factor tips the scale even further in the direction of a favorable exercise of discretion and adds solid support to the position taken by the dissenting BIA panel member.

Significant passages in the medical report that Petitioner would have considered in his case read as follows:

> "Mrs. Ismal reported that she cries all the time, cannot sleep, has bad dreams when she does, feels anxious and worried, has low energy and difficulty concentrating... she does not feel that she can survive without her husband."
>
> "In the event that Mohammad Ismal returned to Pakistan, the depressive symptomatology of his wife would become clinically exacerbated. Her symptoms would be rooted in the reality experience of the separation itself, and it would therefore be difficult to ameliorate those symptoms with anti-depressant medication and/or supportive psychotherapy."
>
> "His loss would represent an emotional catastrophe to both Zane and Zubair. Both of them would be at high risk to develop separation anxiety disorders and depressive symptomatology, if their father returns to

> Pakistan. In chidren depressive symptomatology manifests as failure to thrive, listlessness, apathy and difficulty focusing on schoolwork."
>
> "It is my professional opinion that it would represent an extreme and exceptionally unusual hardship to Anita Ismal, Zane Ismal, and Zubair Ismal in the event that Mohammad Ismal has to return to Pakistan. Mrs. Ismal is suffering from Major Depressive Disorder... If she is to become separated from her husband, she will be at risk for severe and permanent depression... Both boys would be at high risk for the development of separation anxiety disorders and depressive symptomatology."
>
> "Beyond question, it would be in the best interest of this family if Mohammad Ismal were able to remain with his family in the United States."
>
> (AR 25-29)

Notably, the psychologist concluded that family unity was of the utmost importance, and this is exactly what INA § 237(a)(1)(H) was enacted to preserve. *See INS v. Errico*, 385 U.S. 214 (1966). This Court has held that serious weight must be given to the uncontroverted testimony of an expert witness. *Solomon v. Liberty County Comm.*, 221 F.3d 1218 (11th Cir. 2000); *Meeks v. Computer Ass. Intern.*, 15 F.3d 1013 (11th Cir. 1994). In the same vein, this independent expert report must be afforded hefty consideration. With the inclusion of this material new information, a different outcome would be reached in this matter than that reached by the Immigration Judge. But

the Eleventh Circuit Court, however, let the decision of the BIA stand.

C. Other Circuit's application of INA §237(a)(1)(H) is vastly different than the cases within the Eleventh Circuit

Petitioner has shown that he is prima facie eligible for relief under INA § 237(a)(1)(H), as it is undisputed that he is statutorily eligible for the relief. The Eleventh Circuit, however, is consistently maintaining an overly restrictive and inappropriate standard of review of BIA decisions involving INA § 237(a)(1)(H)(I)-(II). A review of recent Eleventh Circuit decisions reveals that an astonishing number of cases, 94.8%, are dismissed involving review of BIA decisions, suggesting the Eleventh Circuit is consistently maintaining an overly restrictive and inappropriate standard of review of BIA decisions involving INA § 237(a)(1)(H)(I)-(II)[2]. As with other federal matters, jurisdiction of the Eleventh Circuit covers immigration cases from Alabama, Florida, North Carolina, Georgia and South Carolina. There are six Executive Offices of Immigration Review or "immigration courts" located within that jurisdiction: Atlanta (2), Charlotte, Miami (2) and Orlando (and immigration courts under those city jurisdictions)[3]. While

2. There were 217 Board of Immigration Appeal decisions reviewed by the Eleventh Circuit Court of Appeals during the same time as the petitioner's petition for review. 203, approximately 94.8%, of all immigration appeals were affirmed by the Eleventh Circuit in 2010. USDOJ, Executive Office for Immigration Review. *Immigration Law Advisor*, Vol. 1, No. 5. http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%202011/vol5no1.pdf

3. http://www.justice.gov/eoir/sibpages/ICadr.htm

the exact number is unknown, it is believed that for the available states of Georgia, North Carolina and Florida alone (encompassing three of the five states within the Eleventh Circuit Court's jurisdiction), there are over 1.8 million undocumented or illegal immigrants residing in those states[4]. In August 2006, while the exact figure is uncertain, the Department of Homeland Security (DHS) placed the illegal or "unauthorized" immigrant population at 10.5 million as of January 2005 and indicates that if recent trends continued, the figure for January 2006 would be 11 million[5]. While it is unknown how many waiver applications were filed within that jurisdiction, initiation of government prosecutions for aliens alleged to have fraud documents, visas, etc. accounted for the third largest lead charge, second only to illegal entry into the U.S. and "bringing in and harboring certain aliens" in 2009[6]. Thus, given the number of alien immigrants in removal proceedings, the number of cancellation case filed, and the dismissal of all known cases before the Eleventh Circuit, it is of national importance that this Court grant this writ. This Court, in *INS v. St. Cyr,* 533 U.S. 289, 320, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) recognized "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (quoting *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987).

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4. See also, Michael Hoefer, Nancy Rytina, and Christopher Campbell, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2005" (Washington, D.C.: Department of Homeland Security, Office of Immigration Statistics, August 2006, cited in "Estimating the Undocumented Population", GAO Report #06-775, at page 17).

5. *Id.*

6. TRAC report, "Immigration Prosecutions at Record Levels in FY 2009." http://trac.syr.edu/immigration/reports/218/

On October 13, 2010, the Eleventh Circuit Court of Appeals denied petitioner's petition for review challenging the Board of Immigration Appeals dismissal of his appeal, which upheld the immigration judge's denial of petitioner's waiver and his request for termination of removal application under INA § 237(a)(1)(H)(I), 8 U.S.C. § 1227(a)(1)(H)(i)(I)-(II). This Court must not let that decision stand because the Eleventh Circuit relied on the government's erroneous conclusion that jurisdiction does not exit in this matter. Given the issues presented in the petition for review, this conclusion does not accurately reflect the prevailing law and the application of that law amongst the other circuits. There are few decisions published by the Board of Immigration Appeals to guide them in reviewing cancellation cases in which the courts should examine hardships and look to positive and negative factors to grant relief from removal or not. *See, for example, Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). In *Monreal*, the BIA emphasized that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." *Id.*

In waiver of removal cases under § 1227(a)(1)(H)(i), there are even fewer circumstances where the circuits courts of review have exercised jurisdiction and vacated decisions of the BIA. In a case where the BIA held that "an alien must establish a qualifying relationship to a living relative" *Matter of Federiso*, 24 I. & N. Dec. 661, 661 (BIA 2008), however, the BIA was recently reversed by the Ninth Circuit Court of Appeals. In discussing its jurisdiction to review BIA decisions made under § 1227(a)(1)(H)(i) the Court averred:

> We review BIA determinations of purely legal issues regarding the INA de novo. *Kankamalage v. I.N.S.*, 335 F.3d 858, 861 (9th Cir.2003). When the BIA interprets a provision of the INA, we first determine if there is any ambiguity in the statute using traditional tools of statutory interpretation. *Id.* at 862. (*citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984)). Only if we determine that a statute is ambiguous do we defer to the agency's interpretation. *Id.* We may not accept an interpretation clearly contrary to the plain meaning of a statute's text. *Id.*

Federiso v. Holder, No. 08-74792. (9th Cir. 2010), reversing *Matter of Federiso*, 24 I & N Dec. 661 (BIA 2008).

The petitioner's case involves legal issues in the application of the "balancing test," namely that the statutory-favorable factors cannot be ignored by the BIA. Said agency cannot ignore established, statutorily-provided examples of what constitutes favorable factors and fixate itself with one factor as the overachieving basis to uphold an IJ's denial of a 237(a)(1)(H) waiver. The Ninth Circuit Court of Appeals, for example, has held that the BIA must take into account all relevant factors, both negative and positive, when exercising discretion and may not give weight to any plainly irrelevant factors. *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002). (citations omitted) (considering the former § 241(f) waiver). The BIA here failed to consider important issues involved in the petitioner's waiver application, as there was only one negative factor not "negative factors" involved - -

his initial entry into the United States with fraudulent documents. Ironically, this "negative factor" has been held previously by the BIA as one which *should not be considered as a negative factor. See Matter of Alonzo*, 17 I&N Dec. 292 (Comm'r 1979), where the Commissioner found that obtaining a visa by fraud or misrepresentation *should not be held as an adverse factor.* Even if the BIA could have considered this one factor as a negative factor in the balancing test, it is hard to understand how any administratively agency could use that to tip the scale of numerous favorable factors all cited in the record, yet given cursory review at best by the BIA in reviewing the IJ's removal order. The BIA has a duty to follow its own precedent, and the Eleventh Circuit should not have upheld a clearly erroneous decision by that agency, one which contained a dissenting opinion adhering to the precedent established by previous BIA decisions. The BIA interprets the waiver liberally to give effect to Congress' purpose. *See, e.g., Matter of DaLomba*, 16 I&N Dec. 616 (BIA 1978) (expansively interpreting the requirement that a noncitizen be "otherwise admissible"); *Matter of Anaba*, 18 I&N Dec. 87 (BIA 1981) (same). The Eleventh Circuit in fact had jurisdiction to review such decisions, as has been done in *Federiso* (citation *supra*). Thus, there are instances when a court of appeals has jurisdiction to review "discretionary" decisions made by the BIA. *See e.g., Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009); *Barco-Sandoval v. Gonzales*, 516 F.3d 35, 38-39 (2d Cir. 2008); *Zacarias-Velasquez v. Mukasey*, 509 F.3d 429, 434 (8th Cir. 2007); *Martinez v. U.S. Att'y Gen.*, 446 F.3d 1219, 1222-23 (11th Cir. 2006); *Bencosme de Rodriguez v. Gonzales*, 433 F.3d 163, 164 (1st Cir. 2005); *Obioha v. Gonzales*, 431 F.3d 400, 405 (4th Cir. 2005); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir.

2005); *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Rueda v. Ashcroft*, 380 F.3d 831, 831 (5th Cir. 2004); *Leyva v. Ashcroft*, 380 F.3d 303, 305-06 (7th Cir. 2004); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003).

In *Mireles v. Gonzales*, 433 F.3d 965 (7th Cir. 2006), the petitioner argued that the Immigration Judge made a legal error in understanding the meaning of exceptional and extremely unusual hardship. The United States Court of Appeals for the Seventh Circuit determined that it retained jurisdiction to review the petitioner's argument. *Id.* at 969. In *Gomez-Perez v. Holder*, 569 F.3d 370, 371 (8th Cir. 2009), the petitioner, a native and citizen of Guatemala, argued before the Immigration Court that his removal would result in exceptional and extremely unusual hardship to his United States citizen children. In denying the petitioner's application, the Immigration Judge noted that the hardship to the children would be largely economic, since the petitioner said his children would remain with their mother in this country. The petitioner also successfully argued that the immigration judge and the BIA "applied an incorrect legal standard by failing to adequately consider certain factors [regarding hardship] that have been considered relevant in other BIA decisions." *Id.* at 373.

In *Figueroa v. Muksaey*, 543 F.3d 487, 491-92 (9th Cir. 2008), petitioner asserted that the immigration judge misapplied the legal standard in evaluating the hardship for non-LPR cancellation, in that he required petitioners to show hardship that was "unconscionable." The petitioner also argued that the immigration judge further erred in only considering the present medical conditions (Attention Deficit Hyperactivity Disorder,

depression, ocular disorder, astigmatism) experienced by the petitioner's children and failed to analyze whether the children would suffer future hardship. The Ninth Circuit looked to other areas of immigration law where a circuit court has jurisdiction over the analysis of a legal issue, even when the overarching decision is a discretionary one, as in this matter. In ruling that it had jurisdiction to review the hardship determination, the Ninth Circuit stated in Figueroa that even if an Immigration Judge's decision is discretionary, it is not outside a court's purview to review the agency's decision if the agency misapplies the law. *Id.* at 495-96 (*citing Hernandez v. Ashcroft*, 345 F.3d 824, 846-47 (9th Cir. 2003) (the BIA "must exercise its discretion within the constraints of the law")). In its decision, the court referenced two prior Second Circuit cases, *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006), and *Sepulveda v. Gonzales*, 407 F.3d 59, 62-63 (2d Cir. 2005), which described the adjudication of a non-LPR cancellation application as a two-part process. That is, the Immigration Judge must first determine whether an individual is statutorily eligible for the relief and, second, he or she must determine whether the alien merits that relief as an exercise of discretion. In *Rodriguez*, the court found it had jurisdiction to evaluate whether the petitioner had committed certain crimes that would render him ineligible for non-LPR cancellation.

In *Aburto-Rocha v. Mukasey*, 535 F.3d 500 (6th Cir. 2008), the Sixth Circuit held that it had jurisdiction to review whether the BIA incorrectly applied its own precedent regarding exceptional and extremely unusual hardship. In accepting jurisdiction, the court stated that "the choice by the BIA to disregard its own binding precedent—even when deciding an issue that is within its discretion—is not itself a discretionary decision Congress

has excluded from review." *Id.* at 503. The court went on to say that because it did not want to "second guess" how the BIA weighed the evidence, it would only look to whether the Board "reasonably construed and applied its own precedents." *Id.* In this case, the BIA ignored the many positive factors and it erred as a matter of law by failing to examine the "cumulative hardship" visited upon the petitioner, much more than the weight the BIA assigned to one negative factor, namely his initial entry into the United States with a fraudulent visa. This is the proper balancing test which all parties acknowledged was used, but used inappropriately in this case. The Eleventh Circuit held that petitioner has not identified any legal error in the BIA's decision and has raised no constitutional or legal issues that we have subject matter jurisdiction to review. In upholding the BIA's decision, the Eleventh Circuit cited review of the BIA's review of the IJ's application of the "balancing test" [7] in cancellation of the petitioner's

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7. The "balancing test" as cited by the Eleventh Circuit requires review of each of the positive and negative factors in petitioner's request to cancel his removal from the United States: 'the question whether to exercise discretion necessitates a balancing of an alien's undesirability as a permanent resident with the social and humane considerations present to determine whether a grant of relief is in the best interests of this country. Adverse factors may include the nature and underlying circumstances of the fraud or misrepresentation involved; the nature, seriousness, and recency of any criminal record; and any other additional evidence of the alien's bad character or undesirability as a lawful permanent resident of the United States. Favorable considerations may include family ties in the United States; residence of a long duration in this country, particularly where it commenced when the alien was young; evidence of hardship to the alien or family if deportation occurs; a stable employment history; the existence of property or business ties; evidence of value and service to the community; and other evidence of the alien's good character. *Eleventh Circuit Court opinion October 13, 2010*, p. 4-5.

removal and concluded that 'the record reflects that the Immigration Judge applied the correct legal standard." *Eleventh Circuit Court opinion*, October 13, 2010, p. 5 (Appendix A). This Court should reverse that opinion, as the BIA must still review the cumulative effect of all evidence submitted such as in cancellation cases. The failure to do so behooves this Court to reverse the Eleventh Circuit Court's decision, notwithstanding certain jurisdictional bars cited by that court. The Eleventh Circuit, in permitting the BIA to pay homage to the "balancing test" yet nothing more, failed to follow its own guidelines in petitioner's case and create a dangerous precedent which will now result in all similar BIA decisions being wrongfully affirmed by the Eleventh Circuit.

Immigration laws are federal issues and should be uniformly and equally applied regardless of which circuit an alien resides. The balancing tests for a waiver, like in the petitioner's case, should be equally applied nationwide. As U.S. Supreme Court Justice Wiley Rutledge once said, "[e]quality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion." Petitioner verily believes that the immigration law was applied to him unfairly and its ripple effect applies to many others living in his jurisdiction. It is both Congress' intent and in America's best interest to have a uniform approach to review of waiver applications and thus the decision of the Eleventh Circuit must not stand.

CONCLUSION

For the above mentioned reasons, we ask the Court to grant the Petition for a Writ of Certiorari.

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Respectfully submitted,

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